The decisions of the Collector, Peh Swee Chin J. and the Federal Court were plainly right and their Lordships will, accordingly, advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Kingsford Dorman; Coward Chance.*

ENG JOO LEE PRIVATE LIMITED v. KIAN CHIANG GRANITE QUARRY COMPANY (PTE) LIMITED.

[P.C. (Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Ackner & Lord Oliver of Alymerton) May 12-15, 19 & June 19, 1986]

[Privy Council Appeal No. 38 of 1984]

Land Law – Lease for quarrying – Grant of licence to extract granite from quarry until expiry of lease – Whether there was oral agreement for renewal of agreement – Whether agreement conditional upon grant of a new lease of quarry – Whether original agreement illegal – Sand and Granite Quarries Act (Cap. 282), ss. 4(1), 5(6) & 20(2).

Sand and Granite Quarries – Licence required – Licence not transferable – Sand and Granite Quarries Act (Cap. 282), ss. 4(1), 5(6) & 20(2).

Practice and Procedure – Appeal – Questions of fact.

The respondents in this case had a lease of a granite quarry in Pulau Ubin for a term of 10 years from September 1, 1969. By a written agreement dated May 2, 1975 the respondents granted the appellants a licence to extract granite from the quarry from May 1, 1975 until the expiry of the lease. It was also agreed that if the Commissioner of Lands offered a further lease to the respondents, then the appellants shall be given priority to continue with the existing arrangement subject to adjustment of the royalty payable. Negotiations took place at the end of 1978 and early in 1979 for the agreement to be renewed. There was a dispute as to whether an agreement was reached. The appellants contended that an oral agreement was concluded at a meeting on July 10, 1979 to the effect that the appellants' licence would be renewed subject only to the respondents' obtaining the renewal of the statutory quarry licence. The respondents denied that any agreement was concluded and maintained that at all times negotiations between the parties were subject to the respondents being granted a new lease of the quarry. The respondents commenced action claiming possession of the quarry and payment of arrears of licence fees. The appellants counterclaimed for specific performance of the alleged oral agreement for the renewal of the agreement and while admitting the arrears, claimed to set off damages for breach of the alleged agreement. The primary questions for decision were issues of fact, namely whether an oral agreement was concluded for the renewal of the 1975 agreement and, if so, whether the agreement was conditional upon the grant to the respondents by the Commissioner of Lands of a new lease of the quarry. Sinnathuray J. in the High Court held ,that no contract was concluded at the meeting of July 10, 1979 and further that at that meeting it was a condition of any agreement for a new licence that the respondents were themselves granted a new lease. He accordingly gave the respondents judgment for possession. He also held that the 1975 agreement was illegal as the appellants had no licence for the use of the land for the quarry, the licence being granted solely to the respondents. Nevertheless, he gave judgment for the respondents for the arrears claimed (see [1982] 1 M.L.J. 22).

The appellants appealed to the Court of Appeal which dismissed the appeal. The appellants appealed further to the Privy Council.

Held: (1) the conclusion of the learned trial judge that there was no concluded agreement for renewal was a finding of fact which was not only clearly open to him on the evidence, but which was strongly supported by the contemporary documents and probabilities;

(2) having found that the 1975 agreement was illegal the learned trial judge was in error in giving judgment for the respondents for the arrears of licence fees. The provision in the judgment for the payment by the appellants of the arrears must be deleted.

Cases referred to:

(1) *Whitehouse* v. *Jordan* [1981] 1 All E.R. 267, 276 & 286.
(2) *The Hontestroom* [1927] A.C. 37, 47 & 48.

COURT OF APPEAL, SINGAPORE (Wee Chong Jin C.J., Kulasekaram & Chua JJ., April 3, 1984).

Philip Cox Q.C. (*Lee Mun Hooi* with him) for the appellants.

Gavin Lightman Q.C. (*Wong Pong Tong* with him) for the respondents.

Wee Chong Jin C.J. (delivering the Judgment of the Court) : By a lease dated September 5, 1978 pursuant to an agreement for lease dated January 6, 1970 the President of the Republic of Singapore ("the lessor") demised to Kian Chiang Granite Quarry Company (Pte.) Ltd. ("the plaintiffs") for a term of 10 years from September 1, 1969 the land known as Plot No. 10, Lot 102 pt. Mukim XXXII at Pulau Ubin, Singapore ("the quarry").

The lease (so far as is material) provided as follows:

(1) that the plaintiffs should grant to the defendants a licence to use and manage the Quarry for the purpose of quarrying granite; and

(2) that the plaintiffs should observe in working and getting the demised minerals all statutory provisions.

By the Sand and Granite Quarries Act, 1970 ("the Act") it is provided that no person shall use or manage any land for the purposes of a sand or granite quarry without a licence from the Licensing Officer authorising him so to do.

The plaintiffs and Eng Joo Lee Pte. Ltd. ("the defendants") by an Agreement in writing ("the Agreement") dated May 2, 1975 agreed (so far as material) as follows:

(1) that the plaintiffs should grant to the defendants a licence to use and manage the Quarry for the purpose of quarrying granite; and

(2) that the operation of the Quarry should be in accordance with the Act;

(3) that the defendants should quarry granite at the Quarry and the defendants to pay the plaintiffs for the granite extracted in the following rates:

(a) $1.70 per cu. yd. for 3/4 inch and 5/8 inch granite; and

(b) $1.50 per cu. yd. for granite blocks. The defendants also agreed to pay for all charges incidental to the operation by the defendants of the Quarry.

(4) that the licence should continue for the balance of the period of the 1978 lease; and

(5) that if after the determination or expiration of the terms of the licence the parties could not agree to have a new licence, then the defendants should sell to the plaintiffs all the machineries installed by the defendants ("the machineries") at 20% of the cost price purchased by the defendants.

Sometime in 1979, the plaintiffs entered into negotiations with the lessor for the extension of the 1978 Lease for a further term of five years from September 1, 1979. The licence granted by the plaintiffs to the defendants under the Agreement expires on August 31, 1979. After the expiration of the licence the defendants remained in possession of the quarry and managed and used the same for the purpose of a granite quarry and excluded the plaintiffs from possession and use of the same.

In these circumstances, this action has been brought by the plaintiffs in which they claim, *inter alia*:

(1) the sum of $101,459.48 being payments due by the defendants under the Agreement;

(2) a declaration that the licence granted to the defendants by the Agreement expired on August 31, 1979 and that the plaintiffs are and have been since such date entitled to possession of the Quarry;

(3) an injunction restraining the defendants by their directors, officers, servants, workmen or agents or any of them or otherwise howsoever from entering or remaining upon the quarry or removing any of the granite stone or ships therefrom and from hindering or interfering with the plaintiffs' use and enjoyment of the quarry.

The defence was that on July 10, 1979, at a meeting between the Board of Directors of the plaintiffs and Mr. Lim, the managing director of the defendants, it was orally agreed that the defendants should have a new licence for a further period of five years from September 1, 1979 upon the terms and conditions set out in a confirmatory letter dated July 12, 1979 written by the defendants' managing director to the plaintiffs. This letter reads:

"Dear Sir,

Re: Granite Quarry Lease

We refer to the discussion held among Messrs Kwek Hong Lye, Chng Gim Huat, Chua Peng Seah, Yeoh Sze Hong and the writer during the meeting on 10th July 1979 in the office of M/s. Hong Leong Co. Ltd. in respect of extension of the Agreement.

We are now writing to confirm our acceptance of your offer as proposed by Mr. Chng Gim Huat during the said meeting, to extend the Agreement dated 2.5.75 for a further period of five years from 1.9.79. However, we wish to place on record the verbal agreement among the members present at the abovesaid meeting that the Agreement dated 2.5.75 shall be extended subject to the following amendments:

(1) Pursuant to clause No. 7 of the Agreement, the monthly tribute payable shall remain at the current rate without change.

(2) Deletion of clause No. 16 of the Agreement.

However, it is noted that the extension of the Agreement herein mentioned shall be subject to your obtaining the renewal of the Quarry Licence from the Commissioner of

Lands and other Competent Authority.

Yours faithfully,

Sgd. Lim Kim Hong
Managing Director"

The trial of the action occupied 29 hearing days and as the learned trial Judge said in his judgment, delivered four days after the conclusion of the trial, the primary issue in this case is whether at that meeting an oral agreement was concluded between the parties. In his judgment the Judge said:

"What appeared on the pleadings to be a case relating to the construction of certain documents has turned out to be a trial in which the evaluation of the oral evidence given at the hearing has become a matter of vital importance."

The trial Judge came to this conclusion on the primary issue:

"So then, on the findings I have made on the evidence of the witnesses who testified before me, I am satisfied that on the discussions had at the meeting on the 10th July 1979, the evidence for the plaintiffs is to be altogether preferred to the evidence given for the defendants. I find as a fact that no contract was concluded at this meeting for the renewal of the 1975 Agreement."

This finding of fact that no contract was concluded at July 10, 1979 meeting for the renewal of the Agreement was challenged in this appeal. In the words of Lord Edmund-Davies in *Whitehouse* v. *Jordan* [1] at page 276:

"It has long been settled law that when the decision of a trial Judge is based substantially on his assessment of the quality and credibility of witnesses, an appellate court must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. ... And that is so irrespective of whether or not the trial Judge made any observation with regard to credibility."

Lord Bridge in the same case at page 286 said:

"My Lords, I recognise that this is a question of pure fact and that in the realm of fact, as the authorities repeatedly emphasize, the advantages which a judge derives from seeing and hearing the witnesses must always be respected by an appellate Court."

We need only refer to one other authority on the strict limitations on the power of an appeal Court to reverse the decision of the Judge on an issue of fact. Lord Sumner in *The Hontestroom* [2] at pages 47-48 said:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial Judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the Judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* Lord Kingdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' Wood L.J., in *The Alice*, says: 'The principle established by the decision in *The Julia* is most singularly applicable ... We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made.' James L.J. thus laid down the practice in *The Sir Robert Peel*: 'The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression.'

Again, in *The Glannibanta* the Court of Appeal, after referring to *The Julia* and *The Alice*, say that they would not be disposed to reverse, 'except in cases of extreme and overwhelming pressure,' but, being of opinion that the trial Judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way."

At the conclusion of the hearing of the appeal Mr. Cox, despite the thoroughness with which he drew our attention to all the factors tending to support a finding that an oral contract was in fact concluded at the meeting of July 10, 1979, was unable to convince us that the trial Judge's finding was wrong and to reverse that finding. This was a case where there was a straight conflict of primary fact between witnesses where credibility is crucial and the Judge's estimate of the witnesses formed a substantial part of his reasons for his judgment. The relevant surrounding circumstances and

documentary evidence were, in our opinion, not so overwhelming or overpowering to convince us that the decision was wrong and in the light of the authorities (*supra*) we found it unnecessary for us to review the evidence of the witnesses as to what transpired at that crucial meeting.

We turn now to consider another issue. The question is, even if there was a concluded oral agreement, whether or not it was a term and condition of the same that the licence should only be granted to the defendants if the lease of the quarry should be renewed by the Commissioner of Lands. It was common ground at the trial that the lease was not and would not be renewed. The case for the plaintiffs was that if an oral contract was in fact concluded, it was conditional on the lease being renewed by the Commissioner of Lands. The case for the defendants was that it was conditional on the renewal of the licence from the Licensing Officer under the Act and, in any event, the plaintiffs had waived the condition that the lease should be renewed.

The Judge accepted the evidence for the plaintiffs that at July 10, 1979 meeting Mr. Lim, the managing director of the defendants, was told that any agreement on the renewal of the Agreement was conditional on the Commissioner of Lands granting a new lease to the plaintiffs and rejected Mr. Lim's evidence that he was told that the lease had been renewed. The Judge also found that Mr. Lim, when he said in the letter that "The extension of the Agreement shall be subject to your obtaining the renewal of the Quarry Licence from the Commissioner of Lands and other Competent Authority," was referring to the lease and not to the licence to quarry because Mr. Lim knew that the Commissioner of Lands had nothing to do with the issue of a licence to quarry. In our judgment the Judge was justified on all the evidence before him in finding in favour of the plaintiffs on this issue.

On the question of waiver, Mr. Cox on behalf of the defendants, relied on two letters from the plaintiffs' solicitors to the defendants dated August 16, 1979 and August 28, 1979. The August 16 letter reads:

"M/s Eng Joo Lee Pte. Ltd.,
1105, 11th floor,
Tan Boon Liat Building,
315, Outram Road,
Singapore 0316.

Dear Sir,

Re: Lease of Granite Quarry

We act for M/s Kian Chiang Granite Quarry Co. Pte. Ltd.

Subject to Contract we are instructed by our clients to forward you the draft Lease which is enclosed herein for your perusal. Kindly acknowledge receipt.

Our clients say that unless the terms of the lease are finalised by the 22nd instant they are not prepared to proceed with the negotiation for an extension of this Lease. As such please arrange for the Lease to be signed on or before the 22nd instant otherwise our clients shall grant the Lease to other interested parties.

Yours faithfully,

Sgd. Yeo Cheng & Co."

The August 28 letter reads:

"M/s Eng Joo Lee (Pte.) Ltd.
1105, 11th floor, Tan Boon Liat Building,
315 Outram Road,
Singapore 0316.

Dear Sirs,

Re: Agreement dated 2nd May 1975

We are instructed by our clients to inform that the above agreement ends on the 31st August 1979. Unless in the meanwhile a new agreement is entered into, kindly arrange to hand over the quarries together with all machines and fittings therein at the expiry of the said agreement.

With reference to our letter of the 16th instant to you please be informed that unless the agreement is signed on or before the 30th instant our clients say that they will withdraw the offer therein.

Yours faithfully,

Sgd. Yeo Cheng & Co."

Mr. Cox's submission was that these two letters clearly show that the plaintiffs were waiving any necessity for the plaintiffs to have a new lease before contracting with the defendants. In our opinion these letters were plainly an offer to enter into a new contract and not a waiver of any term in a concluded contract.

Another issue before the Judge was whether or not the Agreement and the alleged renewal of it was unlawful under the provisions of the Act. The Judge held that the Agreement and the alleged renewal was unlawful. We agree with the Judge, for the reasons he has set out in his judgment, that the Agreement, and the alleged renewal of it, was unlawful under the provisions of the Act.

Another issue raised by the pleadings was, if the parties entered into a new agreement, whether the new agreement is unenforceable because of non-compliance with section 4 of the Statute of Frauds. As this issue was not dealt with by the Judge in his judgment we do not propose to say more than that in our opinion the plaintiffs are entitled to succeed on this issue.

For all these reasons we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Lee Bon Leong & Co.; Ng Wong & Chung.*

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Philip Cox Q.C. (*Mark Strachan* and *Lee Mun Hooi* with him) for the appellants.

Gavin Lightman Q.C. (*Tan Geok Ser* with him) for the respondents.

Cur. Adv. Vult.

Lord Ackner (delivering the Judgment of the Board) : The appellants at all material times carried on the business of quarry operators at a granite quarry in Pulau Ubin Singapore. The respondents held a lease of this quarry from the President of the Republic of Singapore for a term of ten years from September 1, 1969. By a written agreement dated May 2, 1975 ("the 1975 agreement") the respondents granted the appellants a licence to extract granite from the quarry from May 1, 1975 until the expiration of the lease. By clause 7 of the agreement it was provided that if the Commissioner of Lands offered a further lease to the respondents then the appellants "shall be given priority to continue with the existing arrangement as stated in this agreement except that the royalty to be paid to the First Party [the respondents] shall be adjusted according to the then prevailing market price."

Towards the end of 1978 and early in 1979 negotiations took place between the parties for the 1975 agreement to be renewed. On July 10, 1979 a crucial meeting was held between the parties at the Hong Leong Building, Raffles Quay, Singapore which was the headquarters of the respondents' parent company. It was the appellants' case that at that meeting an oral agreement was concluded to the effect that the appellants' licence would be renewed for a period of five years from September 1, 1979, subject only to the respondents' obtaining the renewal of their statutory quarry licence. The terms of this new agreement were substantially to be the same as the terms of the 1975 agreement and were set out in a letter to the respondents dated July 12, 1979 which purported to confirm what was agreed at the meeting.

The respondents denied that any agreement was concluded at the meeting on July 10, 1979 and maintained that at all times negotiations between the parties were subject to the respondents being granted a new lease of the quarry.

On November 8, 1979 the respondents commenced this action claiming possession of the quarry, payment of arrears of licence fees of $101,459.48 and specific performance of the provision in the 1975 agreement which provided, on the termination of the agreement, for the sale by the appellants to them of the machinery installed by the appellants in the quarry. The appellants counterclaimed for specific performance of the alleged oral agreement for the renewal of the 1975 agreement and, while admitting the arrears, claimed to set off damages for breach of the alleged renewal agreement. Thus the primary questions for decision were issues of fact, namely, whether at the meeting held on July 10, 1979 an oral agreement was concluded for the renewal of the 1975 agreement and, if so, whether the agreement was conditional upon the grant to the respondents by the Commissioner of Lands of a new lease of the quarry.

Not long after the commencement of the proceedings, the Commissioner of Lands refused to grant to the respondents a renewal of the lease, but granted only a monthly licence which precluded the renewal of the 1975 agreement.

On March 19, 1982 Sinnathuray J. held that no contract was concluded at the meeting of July 10 and further that at that meeting it was a condition of any agreement for a new licence that the respondents were themselves granted a new lease. He accordingly gave the respondents judgment for possession. In the light of those findings of fact the learned judge did not deal with a number of issues of law, and mixed law and fact which did not therefore arise. He did, however, have to deal with the issue of the illegality of the 1975 agreement. This had initially been asserted by the appellants' solicitors on their clients' behalf early in 1978, in answer to a claim for arrears of $285,744. This

contention was adopted as an alternative plea in the respondents' re-amended statement of claim. This plea, as an alternative, was also relied upon by the appellants, since it was common ground that if the 1975 agreement was illegal, the respondents could have no claim under the agreement for arrears of licence fees or to purchase the quarry machinery. The judge concluded that the 1975 agreement was unlawful and he accordingly held that the respondents' claim to purchase the machinery pursuant to clause 19 of the 1975 agreement was unenforceable. Nevertheless he gave judgment for the respondents for the arrears claimed. This was an oversight on his behalf, an error which persisted in the Court of Appeal.

The appellants appealed to the Court of Appeal which appeal was dismissed on April 3, 1984. In their judgment the Court of Appeal stated *inter alia*:

"... despite the thoroughness with which he [Mr. Cox Q.C., Counsel for the appellants] drew our attention to all the factors tending to support a finding that an oral contract was in fact concluded at the meeting of 10th July 1979 [he] was unable to convince us that the trial judge's finding was wrong and to reverse that finding. This was a case where there was a straight conflict of primary fact between witnesses where credibility is crucial and the judge's estimate of the witnesses formed a substantial part of his reasons for his judgment. The relevant surrounding circumstances and documentary evidence were, in our opinion, not so overwhelming or overpowering to convince us that the decision was wrong and in the light of the authorities we found it unnecessary to review the evidence of the witnesses as to what transpired at that crucial meeting."

The Court of Appeal quoted from the speech of Lord Edmund-Davies in *Whitehouse* v. *Jordan*[1] at page 176 where he said:

"It has long been settled law that when the decision of a trial judge is based substantially on his assessment of the quality and credibility of witnesses, an appellate court must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong ... And that is so irrespective of whether or not the trial judge made any observation with regard to credibility."

A further quotation was also made from the speech of Lord Bridge at page 286 where he said:

"My Lords, I recognise that this is a question of pure fact and that in the realm of fact, as the authorities repeatedly emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court."

Reference was also made to the well known speech of Lord Sumner in *The Hontestroom*[2] at pages 47 and 48.

The Court of Appeal also affirmed the learned judge's decision that the 1975 agreement was unlawful and against this decision there is no cross-appeal.

Relevant events prior to the July 1979 meeting

Their Lordships have already referred to the contention raised by the appellants' then solicitors, in answer to the claim for arrears, that the 1975 agreement was illegal. This contention was based upon the Sand and Granite Quarries Act (Cap. 282), the relevant provisions of which were as follows:

"4(1) No person shall, on or after the date of the coming into operation of this Act, use or manage any land for the purpose of a sand or granite quarry without a licence from the Licensing Officer authorising him so to do.

.....

5(6) No such licence shall be transferable without the consent of the Licensing Officer."

The appellants held so such licence, the licence being granted solely to the respondents. It was the intention of the parties to the 1975 agreement that the appellants should not, and indeed could not, obtain a licence from the Licensing Officer but should "shelter" behind the licence of the respondents. Hence the alleged unlawfulness of the agreement.

This contention was persisted in even to the extent of the appellants' then solicitors stating that they were instructed to make an application to the Court for the appropriate declaration. This attitude was treated by the respondents' solicitors as a wrongful repudiation of the agreement and on January 21 they gave the appellants twenty-four hours notice to vacate the premises. Apparently, although this is not recorded in the correspondence, the appellants' solicitors then withdrew their contention and the appellants began to pay off the arrears.

On December 15, 1978 Mr. Lim, the managing director of the appellants, wrote to the manager of the respondents pointing out that their agreement was due to expire on August 31, 1979 and offered terms for renewal. The payments which he offered to make under a renewal agreement were less than those payable under the 1975 agreement. When giving his evidence, he explained that from

1975 to 1979 the appellants suffered a loss due to the depreciation of their machines over the previous five years. However, they anticipated that future depreciation would be at a reduced rate. In the penultimate paragraph of this letter it is stated "The above terms are offered subject to the granting of the Lease to you by the Commissioner of Lands and other Competent Authorities". This proviso was to be expected – see the terms of clause 7 referred to earlier and the words which were used closely followed those to be found in clause 5 of the 1975 agreement. As will appear hereafter, they are of considerable relevance to one of the main issues in the dispute.

The appellants' offer contained in their letter of December 15 was rejected by the respondents on February 14, 1979. However, the respondents returned to the charge on May 11, 1979, when in purported pursuance of clause 7 they put forward terms which involved a small increase in the amount payable under the 1975 agreement. This letter, in its penultimate paragraph, contained the same proviso expressed in virtually the same words as that stipulated by the appellants in their letter of December 15 referred to above. Despite a reminder written on May 17, Mr. Lim did not reply. The next event of importance was the meeting of July 10, which was the subject matter of oral evidence before the trial judge, and to which their Lordships will refer subsequently under a separate heading.

Relevant events subsequent to July 10, 1979 meeting

Two days after the meeting, that is on July 12, 1979, Mr. Lim dictated to his wife a letter addressed to the respondents which he duly signed. The letter was the sheet-anchor of the appellants' case and it is appropriate to set out its terms in full. It reads as follows:

"We refer to the discussion held among Messrs. Kwak Hong Lye, Chng Gim Huat, Cha Pong Seah, Yeoh Sze Hong and the writer during the meeting on 10th July 1979 in the office of M/s. Hong Leong Co. Ltd. in respect of extension of the Agreement.

We are now writing to confirm our acceptance of your offer as proposed by Mr. Chng Gim Huat during the said meeting, to extend the Agreement dated 2.5.75 for a further period of five years from 1.9.79. However, we wish to place on record the verbal agreement among the members present at the abovesaid meeting that the Agreement dated 2.5.75 shall be extended subject to the following amendments:

(1) Pursuant to Clause No. 7 of the Agreement, the monthly tribute payable shall remain at the current rate without change.

(2) Deletion of Clause No. 16 of the Agreement.

However, it is noted that the extension of the Agreement herein mentioned shall be subject to your obtaining the renewal of the Quarry Licence from the Commissioner of Lands and other Competent Authority."

That letter was collected by Mr. Yeoh, the respondents' manager who was responsible for the day-to-day management of the respondents. On the letter there was typed opposite Mr. Kim's signature "I hereby acknowledge receipt of this confirmation letter" and Mr. Yeoh after reading the letter signed underneath these words on behalf of the respondents.

It will be readily observed, first that the terms which the letter purported to confirm involved no change in the rate payable by the appellants. The only alteration to the agreement related to the deletion of clause 16 (which concerned the use by the appellants, on payment, of part of the respondents' office accommodation). Secondly the final paragraph, while using by now the time-honoured expression "the Commissioner of Lands and other Competent Authority", referred, not to the renewal of the *Lease*, but to the renewal of the Quarry *Licence*.

A month passed without any reaction by the respondents to the letter of July 12 being communicated to the appellants. On August 16 the respondents' solicitors, to whom the letter of July 12 had been handed, wrote to the appellants in these terms:

"Subject to Contract we are instructed by our clients to forward you the draft Lease which is enclosed herein for your perusal. Kindly acknowledge receipt.

Our clients say that unless the terms of the Lease are finalised by the 22nd instant they are not prepared to proceed with the negotiation for an extension of this Lease. As such please arrange for the Lease to be signed on or before the 22nd instant otherwise our clients shall grant the Lease to other interested parties."

Reference should be made to the following clauses of the draft which was sent with the letter:

Clause 6

"This Agreement shall take effect from 1st September 1979 and the duration of this Agreement is dependent on the lease granted by the Commissioner of Lands to the First Party [the respondents] in Clause 10."

Clause 10

"The First Party's lease from the Commissioner of Lands expires on the 31.8.79 but has applied for a new lease for 5 years which may be given by the Commissioner of Lands. ..."

Clause 16

"The Second Party [the appellants] shall agree and undertake to supply the First Party for the entire duration of this Agreement 5000 cubic yards of ¾" granite chips to be delivered to site or sites as directed by the First Party for every month. ... The price shall be fixed at $14.75¢ per cubic yard delivered to sites as directed abovementioned. ..."

At this time, very considerable building development was contemplated in Singapore. The appellants (very probably the respondents too) anticipated that the price for granite would soon rise considerably, as in fact it did. With this in mind, clause 16 of the draft lease was viewed by the appellants as being most unattractive. They accordingly replied on August 20, drawing attention to the meeting held on July 10, 1979, alleged that at that meeting it was agreed that the existing agreement would be extended for a further five years, and enclosed a copy of the letter of July 12, which had been handed to Mr. Yeoh. To this letter the respondents' solicitors replied on August 28, 1979 stating that unless the agreement was signed on or before August 30, their clients would withdraw their offer and claim possession of the quarries together with their machines and fittings.

The other "interested parties" referred to in the final sentence of the respondents' solicitors' letter of August 16 quoted above comprised, or at least included, a company called Island and Concrete, whose business was selling concrete made from ¾" granite. At or about the end of August, when the correspondence referred to above was taking place, Mr. Yeoh was contemplating entering into an agreement with this company, should the appellants fail to accept the terms of the draft lease.

On August 30, 1979 a "without prejudice" letter was written by Mr. Dodwell on behalf of the Commissioner of Lands stating that the Land Office was prepared to recommend the extension of the lease granted to the respondents for a further period of five years. He set out the proposed terms and special conditions and requested that the respondents should signify their acceptance within two weeks by depositing with the Lands Office the sum of $49,140. In his penultimate paragraph he stated that his communication did not constitute an offer to extend the lease, as the President's approval had yet to be sought. With his letter he sent a draft lease and this, unlike the respondents' previous lease, contained a covenant not to assign, demise sub-let or mortgage the land in whole or in part. On the same day the appellants' solicitors wrote to the respondents' solicitors, referring to their letter of January 20, 1978 and while mentioning again the illegality point referred to above, claimed that the 1975 agreement had been extended for a further period of five years and did not therefore expire on August 31, 1979. They referred again to the letter of July 12, 1979, rejected the draft agreement sent with the respondents' solicitors' letter of August 16 and gave notice of a claim for damages if the respondents persisted in their attitude. On September 3, 1979 the respondents' solicitors replied stating *inter alia* that at no time did the respondents agree to an extension of the agreement on the terms alleged. The letter concluded thus:

"What your clients have done so far has been to initiate negotiations to renew the agreement and our clients were non-committal until the draft agreement was sent to them on the 16th August 1979.

Kindly note that our clients will be taking over possession of the quarry immediately and legal proceedings will be taken to evict them if they continue to trespass thereon."

Correspondence continued to pass between the solicitors during the next month. The respondents apparently changed their solicitors and on October 24 their new solicitors wrote to the appellants' solicitors drawing attention to the fact that under the terms of an agreement for a lease between the respondents and the President, the respondents were precluded from assigning, demising, subletting or mortgaging the quarry either in whole or in part. They stated that in the circumstances the agreement for the extension, upon which the appellants were relying, was merely academic, since even if the respondents wished to extend the agreement, they were prohibited from so doing.

On November 8, 1979 the respondents delivered their statement of claim in which they sought a declaration that the 1975 agreement terminated on August 31, 1979, an injunction restraining the appellants from remaining or continuing in possession or control *etc.* of the quarry, an order for specific performance of clause 19 of the 1975 agreement concerning the sale to them of machinery and damages for trespass. The learned pleader in paragraph 3 of that statement of claim referred specifically to clause 7 of the 1975 agreement and alleged that pursuant to that provision negotiations

had taken place for an extension of the 1975 agreement, subject to renewal of the lease by the Commissioner of Lands, and that it was an implied term of the 1975 agreement, or alternatively it was a condition precedent to any liability on the part of the respondents to extend the 1975 agreement, that any extension of the Lease by the President should not contain any prohibition or other covenant against assigning, demising or sub-letting the quarry. In paragraph 4 of that statement of claim the letter of August 31, 1979 from Mr. Dodwell referred to above was quoted, as later was the respondents' solicitors letter of October 24, 1979.

Shortly before the close of pleadings, Mr. Dodwell on behalf of the Commissioner of Lands wrote a further letter to the respondents on December 3, 1980 stating that it had now been decided not to renew the five-year lease, but that the Land Office was prepared to allow the respondents to continue granite quarry operations on the land until such time as the land was required by the Government. It was therefore proposed to issue a temporary occupation licence on a month-to-month basis from September 1, 1975 subject to terms and conditions (referred to as "the printed conditions") provided that the licence should not be transferred or assigned in any manner whatsoever, without the written consent of the Collector of Land Revenue. This led to the respondents re-amending the statement of claim so as to allege that the negotiations for the extension of their Lease had proved abortive.

The meeting of July 10, 1979

It was common ground that the burden of proof of the existence of this agreement lay upon the appellants. Accordingly Mr. Cox opened the case and called his evidence. This consisted of Mr. Lim and his wife, Mrs. Lim. In addition a Mr. Goh, the appellants' marketing manager, was called to prove that he did *not* attend the meeting. The trial judge was satisfied that Mr. Goh did attend the meeting and no criticism is made of this finding. It is however some, albeit a small indication of the unreliability of Mr. Lim's memory.

The trial judge found Mr. Lim to be an unsatisfactory witness. His justification for reaching this conclusion has not been criticised by Mr. Cox. His judgment was in these terms:

"From the evidence-in-chief of Mr. Lim, it is to be inferred that it was a short meeting. He said that after the discussion on the fluctuation of prices of granite between him and Mr. Chng, there was a brief conversation between Mr. Chng and Mr. Kwek, there was a nod from Mr. Kwek, and then Mr. Chng announced that the 1975 Agreement would be extended for a further period of five years with the exclusion of one clause in the Agreement. But when I consider the evidence of Mr. Lim in cross-examination, I find that it was a fairly long meeting at which many topics were discussed. The examination of the whole of his evidence supports the submission of Mr. Lightman that there are many unsatisfactory features in the evidence of Mr. Lim, like his inability to recall when he ought to, changes in his evidence after adjournments, outstanding contradictions and there are other disturbing elements in his evidence. One example will suffice. There is the crucial matter of whether the renewal of the lease by the Commissioner of Lands was mentioned at the meeting. As regards it, it is on record in the opening address of Mr. Cox that there was no discussion of the lease at the meeting. At one point in the evidence of Mr. Lim there is his negative answer. On another occasion he said it was mentioned at the beginning of the meeting. Yet on another occasion, he said it was at the end of the meeting. Finally, there are his responses that he was told of the renewal before the meeting."

Sinnathuray J. then went on to consider a finding of considerable importance which he had to make, namely whether there was any mention at the meeting of the grant of a *lease* by the Commissioner of Lands. He said:

"It is the plaintiffs' case that Mr. Lim was told at the meeting that any agreement on the terms for the renewal of the 1975 Agreement was conditional to the Commissioner of Lands giving a new lease to the plaintiffs. Mr. Lim's case however is that at that meeting he was clearly told that the lease had been renewed. I find as a fact that the plaintiffs' case is the true account. The matter is put beyond doubt in the letter of Mr. Lim written two days after the meeting, on 12th July 1979. I am not concerned here with the body of the letter in which I find Mr. Lim sets out *his understanding* of the discussions had at the meeting. In the context of the matter I am dealing with, it is the statement of Mr. Lim in the last sentence of his letter that is crucial. It corroborates the oral evidence given for the plaintiffs and refutes the defendants' version of the discussions had at the meeting. The last sentence of Mr. Lim's letter reads as follows:

> 'However, it is noted that the extension of the Agreement herein mentioned shall be *subject to your obtaining the renewal of the Quarry Licence from the Commissioner of Lands and other Competent Authority.*'

On the phrase 'Quarry Licence' in the above sentence, there is the evidence of the wife of Mr. Lim that she had typed the letter, that the letter was dictated to her in Mandarin by her husband, and that the words 'Quarry Licence' were spoken by him to her in English. I need not dwell on her evidence. It is clear from a reading of her evidence that, as was submitted by Mr. Lightman, she was a dutiful wife who gave evidence to serve the interests of her husband.

Mrs. Lim was called to buttress the evidence of Mr. Lim that at the meeting of 10th July 1979 there was a discussion not on the grant of a lease by the Commissioner of Lands but on the issue of a licence for the quarry by the Public

Works Department, and that is why Mr. Lim had referred in his letter to the 'Quarry Licence'. I do not want to go into the topic relating to the issue of licence by the Public Works Department canvassed at the hearing. Mr. Lightman has dealt with it fully and I accept his submissions thereon. As for the phrase 'Quarry Licence' in the letter, I am satisfied that by making reference to the Commissioner of Lands Mr. Lim, as he had done in his letter of 15th of December 1978, was referring to the 'quarry lease' because the interest of the Commissioner of Lands is in the lease and not in the issue of licence by the Public Works Department. I am also satisfied that Mr. Lim knew very well that the issue of licence by the Public Works Department has got nothing to do with the Commissioner of Lands."

Although Mr. Cox, in his most able and painstaking address, sought to persuade their Lordships that the learned judge reached the wrong conclusion, this was a finding of fact which was not only clearly open to the trial judge on the evidence, but which was strongly supported by the contemporary documents and the probabilities. Their Lordships have already commented upon the documents which existed prior to the letter of July 12, 1979 in which the formula "subject to the renewal of the Lease by the Commissioner of Lands and other Competent Authority" is to be found. It was improbable that the parties would have entered into an unconditional contract. If they had done so, then in all probability it would have been recorded at the conclusion of the meeting. Negotiations had proceeded in pursuance of clause 7 of the 1975 agreement which gave the appellants a priority right to a renewal, *but* conditional upon the offer of a new lease by the Government. At the date of the meeting the respondents had not then even received notification that a recommendation would be made that they should be granted a new lease.

The trial judge not only found Mr. Lim an unsatisfactory witness, but in view of his finding as to the true meaning of the proviso in the letter of July 12, 1979, he must have concluded that Mr. Lim had been untruthful on a matter of crucial importance.

In addition to Mr. Yeoh, the manager of the respondents, Mr. Chng, a director who *de facto* was the managing director of the respondents and a Mr. Kwek, the chairman of the respondents, gave evidence. The trial judge gave his assessment of these witnesses in the following terms:

"In contrast to the evidence given by Mr. Lim, the evidence for the plaintiffs [the respondents] of what took place at the meeting is more complete and vivid. One gets a clear picture of that business meeting, of the negotiations that took place between Mr. Lim and Mr. Chng consequent upon the failure of the parties to agree to a renewal of the 1975 Agreement through the exchange of letters. Put shortly, the evidence for the plaintiffs [the respondents] is that the parties did not come to any agreement at the meeting because they could not agree on the terms for the renewal of it. It is common ground that the meeting ended with Mr. Lim being told to go back and write a letter."

The essence of the appellants' criticisms of the trial judge is that he was prepared to place any reliance at all upon the evidence of the respondents' witnesses. The contention of Mr. Cox, which he pursued both eloquently and vigorously, was that he had totally discredited these witnesses. Their Lordships will deal in detail with this submission, but were it to be acceptable, the rejection of the respondents' witnesses would not *ipso facto* reconstitute Mr. Lim as a reliable and truthful witness. The most Mr. Cox could, in such circumstances, hope to achieve would be a new trial.

Island Concrete Limited.

During the twenty-nine days which this trial took, much time was devoted to the nature of the agreement which the respondents had entered into with Island Concrete, after they had failed to come to terms with the appellants. It was the appellants' case that the respondents repudiated the oral agreement made on July 10, 1979 in order to enter into a more advantageous arrangement with Island Concrete who, like the respondents, were also under the control of the Hong Leong Group. The respondents accepted that they had approached Island Concrete after their negotiations with the appellants to renew the 1975 agreement had broken down, but they maintained that they only entered into a *sub-contract* with Island Concrete for the latter to operate the quarry on their behalf. To support this claim there was produced an agreement dated October 15, 1979, made between the respondents and Island Concrete which purported to be such a sub-contract. Mr. Cox satisfied the trial judge not only that the date of the agreement was inaccurate in that it had been substantially backdated but, far more important, it did not represent the true relationship between the parties. The sub-contract was a fictitious agreement, the validity of which the respondents had sought to support by false documents. These documents were brought into existence in order to satisfy the court that the trading between the respondents and Island Concrete was in accordance with the sub-contract.

The trial judge was satisfied that the alleged sub-contract and its supporting documents did not

represent the true relationship between the respondents and Island Concrete. He said:

"On a review of the whole of the evidence on this subject, the conclusion I come to is that the arrangement the plaintiffs [the respondents] have with Island Concrete is similar in nature to the terms in the 1975 Agreement the plaintiffs [the respondents] had with the defendants [the appellants]. The plaintiffs have given Island Concrete a licence coupled with an interest in the land in Pulau Ubin to use and manage the land for the purposes of a granite quarry. Like the 1975 Agreement, the arrangement the plaintiffs have with Island Concrete is illegal under the Act. It is also in breach of the Temporary Occupation Licence given to the plaintiffs by the Commissioner of Lands."

Clearly one of the reasons for the fictitious agreement was to conceal the fact that the respondents were operating in breach of the Temporary Occupation Licence. Moreover, insofar as they were raising the plea of illegality as an answer to the appellants' claim that the 1975 agreement had been renewed, it was clearly in their interest to conceal that they had entered into a similar agreement with Island Concrete. Mr. Lightman submitted to the trial judge that the truth as to the relationship between the respondents and Island Concrete was only relevant to the appellants' plea in paragraph 8 of the re-amended defence, *viz.* that by granting Island Concrete the licence, the respondents were precluded or estopped from relying upon the absence of Government approval as a ground for avoiding their obligation under the agreement made on July 10, 1979. He submitted that it had no relevance to the credibility of his witnesses. The judge rightly rejected this submission. The dishonest behaviour of the respondents, after the failure of the parties to come to terms, was clearly relevant to the issue of the reliability of their testimony as to what had occurred at the all important meeting of July 10, 1979. However, it was entirely a matter for the trial judge, who had the benefit of hearing the evidence of the respondents' witnesses, an advantage denied to their Lordships and to the Court of Appeal, to decide to what extent, if at all, their evidence with regard to the meeting of July 10, 1979 was in the circumstances acceptable. It was for him to decide whether, having regard to the subsequent dishonesty, their credibility was totally destroyed or whether they could still be relied upon to tell the truth with regard to what had happened at that meeting. He concluded that their testimony as to what had occurred at the meeting of July 10, 1979 was creditworthy. Their Lordships can see no valid basis for contending that, in reaching this conclusion, he did not give proper weight to the important findings which he had made with regard to the true relationship between the respondents and Island Concrete, the fictitious nature of the alleged sub-contract and the falsity of the connected documents.

For the reasons given their Lordships dismiss this appeal with costs, save that the provision in the judgement of Sinnathuray J. for the payment by the appellants of the arrears will be deleted.

Appeal dismissed.

Solicitors: *Jaques & Lewis; Coward Chance.*